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United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY,
(a Corporation),
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

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STATEMENT OF THE CASE

Two reasons have been assigned by Counesl for plaintiff in error why the judgement in this case should be reversed. These reasons are: first, that the legislature of the Territory has no authority to enact any statutes regulating fisheries; second, that the statute in question is local and

for that reason is a violation of the Act of 1886 which enjoins the legislature from passing local or special laws for the protection of game or fish.

These problems will be discussed in the order in which they are presented in the brief of counsel for plaintiff in error.

I.

THE ORGANIC ACT GIVES THE LEGISLATURE AUTHORITY TO REGULATE FISHERIES.

It should be noted that it is not Section 3, but Section 9, of the Organic Act which bestows the legislative powers upon the local legislature.

Section 9 provides that "the Legislative powers of the Territory shall extend to all rightful subjects of legislation."

Had the Organic Act stopped at that point, the clause above quoted would have delegated to the Legislature of the Territory all authority which Congress itself possessed over the Territory, exclusive, however, of the Federal functions of Congress, i. e., the functions delegated to Congress by the sovereign States.

The protection of game and fish are rightful subjects of legislation, and subjects which do not belong to Congress in its Federal capacity, but over which it is given jurisdiction by the Constitution in its sovereign authority over de-

pendencies which have for themselves no independent sovereignty.

Binns vs. U. S., 194 *U. S.* 486.

The question now arises as to whether the limitations upon the legislative authority of the Territory prohibits the local legislature from enacting any laws tending to regulate the fisheries.

The clause in Section 3 relied upon by plaintiff in error was inserted when the bill was before the House. The debate on the floor clearly shows that the reason for the amendment was the fear that some legislature of the Territory might undertake to liberalize, if not to repeal, the restriction which Congress in former Acts, more especially by the act of 1906, had imposed upon the common right of fisheries. The debate very clearly shows that the purpose and intent of Congress was to permit the legislature to enact additional restrictions upon the rights of fisheries, but to prohibit any change which had a tendency to expose fish or game to destruction.

The important part of this debate is set out in the opinion of the lower Court in the case of Territory vs. Alaska Pacific Fisheries, 5 Alaska Rep. 325.

Explicitly as the intent of Congress is expressed in the records of the bill, it is not, however, necessary to resort to that record for the purpose of solving the problem now before the Court:

The common right of fishery is a right conferred by the common-law and guaranteed by

Magna Charta. It was not, and did not have to be, conferred upon the people of the Territory by any statutory enactment. All the congressional legislation on the subject consists of restrictions upon that right of fishery which inherently belongs to every inhabitant of the Territory. Section 3 simply provides that no modification shall be made of those restrictions.

The fish laws, being in their nature purely restrictive, can be modified, altered or amended only by relaxing them. No attempt has been made to do so. Additional restrictions cannot be said to relax, and therefore cannot be said to modify, the restrictions imposed by Congress.

This view is quite consistent with the manner in which the Courts have interpreted similar restrictions upon State or Territorial authority to legislate on certain subjects within the jurisdiction of the Federal Government.

For instance, Section 2324 R. S. of the United States provides:

"The miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession, subject to the following requirements: ***** on each claim located and until patent has been issued therefore, not less than $100.00 worth or labor shall be

performed or improvements made during each year."

The Mojave mining district in California had adopted a mining reglation which provides that, "within 90 days of location, a shaft shall be sunk or a tunnel run to a depth of not less than 10 feet from the apex of the ledge of mineral bearing quartz; otherwise, the claim shall be subject to relocation." This Court held that this mining regulation was valid and not in conflict with the Federal enactment because it did not undertake to diminish, but only to increase, the work required by Congress.

Said the Court:

> "The statute was intended to express the most liberal terms on which the United States would part with its rights in mining claims. No state legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the requirements of the United States."

Northmore vs. Simmons, 97 *Fed.* 386.

The same point was decided in the same manner by the upreme Court of Nevada in the case of Sissons vs. Sommers, 55 Pac. 829.

In Mining Company vs. Kerr, 130 U. S. 256, the Supreme Court held that a state regulation might reduce the width of a mining claim from 300 feet on each side of the middle of the vein to 25 feet of each side. And in Erhardt vs. Boaro, 113 U. S. 527, the same tribunal held

that a state law requiring a discovery shaft to be sunk upon the lode was a valid requirement for the legal location of a mining claim.

In the case at bar it may well be said, paraphrasing the language of this court in Northmore vs. Simmons, that the restrictions upon the common right of fishery contained in the federal fish law were intended to express the most liberal terms on which the United States would permit fishing to be conducted in Alaska. No legislature may grant more favorable terms than those which are demanded by the Federal statute. But that statute contains the full extent of the requirements of the United States, and additional requirements may be imposed by the local legislature.

An analogous situation arose over the election laws of the Territory of Alaska.

Section 5 of the Organic Act provides, "that the Act of Congress entitled, 'An Act providing for the election of a delegate to the House of Representatives from the Territory of Alaska,' approved May 7th, 1906, or Acts amendatory thereof, shall continue to apply to all elections except so far as it is modified by this Act."

The Act of 1906, 34 Stat. L. 169, provided for the form of the ballot to be used. That form was simply an adoption of the old system of voting in vogue prior to the advent of the Australian system.

By Chapter 25, Laws of Alaska for 1915, the legislature adopted the Australian system of voting and provided for filing of declarations of candidacy and the printing of official ballots.

The election of Delegate to Congress from Alaska in 1916 resulted in a contest between James Wickersham and Charles A. Sulzer. Judge Wickersham took the position that the Territorial election law was an amendment or modification of the election proceedure prescribed by Section 5 of the Organic Act. But that contention was not sustained by the House of Representatives. The election committee, as well as the House of Representatives, took the position that it was within the authority of the local legislature to adopt additional safe-guards for the conduct of elections to carry out the general scheme of Congress.

To the same general purpose are the cases holding that the states of the Union may enact liquor laws restricting the sale or possession of intoxicants in addition to the restrictions provided by Congress.

Vigliotti vs. Pennsylvania, 258 *U. S.* 403.
See also Reid vs. Colorado, 187 *U. S.* 148.

In determining whether or not a Territorial law is in conflict with a Federal law the purpose of the latter must be kept in mind. If the object of the Federal law is not to confer certain privileges, but to limit certain common-law rights, then and in that case any local legislation which

still further limits or restricts those rights or provisions is not considered as conflicting with, but as assisting in ,carrying out the general purpose of the Federal legislation.

The question here at issue fairly arose in the case of Alaska Fish Salting and By-products Company vs. Smith, 255 U. S. 44. In that case the Territorial legislature was accused of having levied an excise tax which had a tendency to destroy the industry of herring fishing for certain purposes. Plaintiff in error took the position that the tax was an attempt to regulate fishing in the waters of Alaska. The Supreme Court ruled that such authority was possessed by the Territorial legislature, and if the local legislature thought it wise to put a stop to the fishing of herring for certain purposes, it had a good right to do so even though it utilized the taxing power for that purpose.

It would seem self-evident that if the legislature could employ the taxing power for the purpose of limiting fishing, or stopping fishing entirely, it could just as well and with the same right apply the general police power. The taxing power is only a branch of the police power.

In a still more recent case the Supreme Court held, even more explicitly, if possible, that the legislature of the Territory could regulate the fisheries by placing restrictions upon them.

Haavik vs. Alaska Packers Association 264 U. S. (44 Sup. Ct.)

In that case, which was decided last January, it appears that the legislature of the Territory had levied a license tax of $5.00 upon non-resident fishermen, while no tax was levied upon resident fishermen. The law was attacked, first, on the ground that the Territory had no authority to regulate the fisheries, second, on the ground that the law violated the equality clause of the 14th amendment to the Constitution; third, on the ground that it violated the fifth amendment to the Constitution; fourth, that it violated the Interstate Commerce clause, and, fifth, that it violated Section 2 of Article IV of the Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The Supreme Court held that the power of the legislature in the matter of levying this regulatory tax was equal to the power of Congress itself, that the power to make the regulation had been delegated by Congress to the legislature, and that the only question remained as to whether or not Congress itself could have enacted such a law.

In conformity with the ruling of the Supreme Court in the case of the Territory of Alaska vs. Troy 258 U. S. 101 it was held that the word "state" when employed in the Constitution precluded the idea of a "territory" and that therefore neither the provisions of Section 2 of Article IV nor the equality clause of the 14th amendment applied to the Territory.

The discriminatory tax upon non-resident fishermen was sustained on the ground that Congress had authority to levy such a tax and that this authority had been delegates to the legislature.

It would seem that this decision should settle the question of the authority of the local legislature to regulate the fisheries of Alaska by increasing the restrictions placed upon the common right of fishery by the Federal enactments.

A plausible argument is adduced by counsel from the accident that in Section 3 of the Organic Act the fish laws were placed in a category with customs laws, internal revenue laws, and postal laws, and it is insisted that if the Court holds that the legislature may regulate the fisheries, it must, perforce, hold that it has authority to add something to the postal, internal revenue and customs laws of the government.

The first answer to this contention is that while the fish laws are purely restrictive, the customs laws, revenue laws and postal laws are creative. The latter laws establish certain departments or bureaus to carry on certain public work and prescribe the method for so doing. Any addition to those laws is in its nature a modification of them.

In the second place it is obvious that the last named laws were enacted by virtue of the Federal functions of Congress. These functions can-

not be delegated either to a state, a territory or a department of the government. The proviso in Section 3 prohibiting modification of those laws was therefore entirely unnecessary. Congress could not, even if it had tried, delegate any authority to amend, modify or repeal those laws.

Counsel seems to have overlooked the fact that Congress, in dealing with Alaska, acts in a dual capacity,—in the capacity of a Federal legislature, and in the capacity of a territorial legislature. Its authority as a territorial legislature may be delegated, but its authority as a federal legislature may not be delegated. The fear expressed by counsel that affirmation of the judgement in this case will imply an authority in the legislature to enact statutes regulating customs duties, internal revenue and the postal service is entirely unfounded.

That no significance should attach to the fact that the fish laws enacted by Congress were placed in the incongruous category so glaringly brought out by counsel is evident from the history of the Act itself.

The bill, H. R. 38, which was before the House at the time of the debates referred to, was a Committee Substitute for H. R. 38, introduced by James Wickersham, Delegate from Alaska, April 4, 1911. Section 4 of the original H. R. 38, reads as follows:

> "That the Constitution of the United States, and all the laws thereof which are

> not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that all of the laws of the United States establishing a civil government in Alaska, and extending the laws of the United States thereto, shall continue in full force and effect until altered, amended or repealed by or with the consent of Congress."

Another bill, H. R. 19860, introduced the previous session by Mr. Hamilton, then chairman of Committee on Territories, was also before the committee for discussion together with other bills aiming to create some form of territorial home rule.

It appears, that in preparing the committee substitute, Section 8 of the Hamilton bill was adopted as Section 3 of the committee substitute in place of Section 4 of the Wickersham bill, hence the incongruity. When Mr. Willis of Ohio moved his amendment on the floor of the House, he inserted it where the language employed seemed to be fitting and sufficient, but with the express statement, that, as before pointed out, it was intended only to restrain the legislature from relaxing the restrictions upon the common right of fisheries.

Some importance is, by counsel for plaintiff in error, attached to the fact that during this present month a bill did pass Congress regulating fisheries in Alaska.

It will be observed that even when the Organic Act was before the House for discussion, another bill was pending before Congress placing additional limitations upon the right of fishery, and during the discussion it was conceded by all parties interested, that, even if the then pending fish bill became a law, it did not take away from the legislature the authority to make additional restrictions.

The Alaska fish law which was passed during the present month is simply an expression of the dissatisfaction of Congress with the failure of the local legislature to properly restrict fishing in territorial waters. Chapter 95 of Laws of 1923, the act here involved, applies only to Southeastern Alaska, and leaves the waters on both sides of Alaska Peninsula subject to depletion. Had the legislature acted with sufficient promptitude in passing restrictive measures, it is probable that Congress would have taken no further steps in the matter.

It is also urged that the Alaska fish law of 1906 gives the Department of Commerce and the Bureau of Fisheries full control over the fisheries of Alaska, and that this contention is demonstrated by the fact that the President withdrew large areas of the fishing grounds from the public, calling them reserves, and dividing them up among individuals.

The illegality of this proceeding is beyond doubt, and can be pardoned only on the theory of emergency.

During the month of November, 1923, in the City of Washington, D. C., a suit in equity was commenced against the Secretary of Commerce to enjoin him from carrying out this so-called "reserve system." As an answer to that suit, on the first day after Congress had been organized, and on the 6th day of December, 1923, two bills were introduced with the identical purpose, one a copy of the other, one being introduced in the enate by Jones of Washington as S. 486, and the other in the House by Mr. White of Maine as H. R. 2714. Those two bills simply provided that the President should have a right to create fish reserves in the waters of Alaska by suspending the common right of fishery, and to prescribe rules and regulations under which fishing might be conducted.

Section 6 of the fish law of 1906 provides that the Secretary of Commerce may, in his discretion, set aside any streams or lakes as preserves for spawning grounds, in which fishing may be limited or entirely prohibited; and when, in his judgement, the results of fishing operations in any stream, or off the mouth thereof, indicates that the number of salmon taken is larger than the natural production of salmon in such stream, he is authorized to establish closed seasons or to limit or prohibit fishing entirely for one year or

more within such stream or within 500 yards of the mouth therof.

This is the authority, and also the limitation upon the authority, of the executive department of the government to create fish reserves. Here its power begins and ends.

The common right of fishery is a property right belonging to each individual. The sea is not owned by the government as a proprietor. The governmental authority is only *jus regium*, a right to regulate.

II.

THE LEGISLATION IS NOT LOCAL.

The Act of July 30, 1886, provides, "That the legislatures of the territories***** shall not pass local or special laws*****for the protection of game or fish."

The direct inference from the language is that the legislature does have authority to pass laws for the protection of game and fish. The question which remains to be answered is whether or not the law here in question is "local or special."

What is and what is not the local statute is at times difficult to determine, and it may be conceded that the authorities are not in entire harmony. The doctrine on this subject laid down by Judge Denio and followed in New York and very largely throughout the rest of the country seems sound and reasonable.

Under a constitution which prohibits local or private laws the legislature of New York enacted a statute providing for punishment of larceny when committed in New York much more reverely than when committed any where else in the state. In holding the law constitutional, Judge Denio said:

"The provisions of the act under direct consideration, which relates to police justices and courts and their clerks, may be considered local; but I am of the opinion that the 33d section, which provides for an increased punishment for petit larceny, when committed by stealing from the person, in the city of New York, is not local within the meaning of the Constitution. It has, no doubt, features which savor of locality, for it punishes a well-known common-law offense more severely, if committed under peculiar circumstances within the limits of the city, than if committed elsewhere. But it prescribes the rules of conduct for all persons whether residents of the city or of any other part of the state, and its increased penalties are intended to protect residents of other localities equally with the inhibitants of the city; and it was probably intended especially for the security of strangers and sojourners who are apt to lack the habitual caution of permament citizens of large towns. Offenders when convicted are to be imprisoned in one of the prisons of the state out of the city, and to be provided for at the expense of the state at large; and the disqualifica-

tion which attaches to a convict under the act affects him whenever he may be in this state. I cannot think that a statute having such consequences is to be classed with special provisions making appropriations for particular roads, public buildings, or the like, situated in particular local divisions. Upon this point I concur with the views expressed in the opinion given in the Supreme Court."

Williams vs. People, 24 *New York* 405.

In Healy vs. Dudley, 5 Lans., 115, 120 et. seq., the Court held that the criterion by which to determine whether an act is local or general is to enquire whether under it the people of the state can be affected; if not, it is local, if they can be, it is general.

Of a more recent date is the case of Ferguson vs. Ross 13 N. Y. S. 398. In that case the Court considered the question of whether or not a law prohibiting the deposit of offal in the bay of New York or Rarita bay was local. The Court held it was not and in that behalf said:

> "The statute in question operates upon a subject in which the people of the world are interested.—Its purpose was essentially public, and the fact that it wears some local features is insufficient to place it among the local acts *****
>
> "We think that, in as much as the act in question operates upon a subject in which the whole people are interested, and prescribes a rule of conduct for all persons, and renders all persons liable to its penalties, where-

ever they reside, it is to be considered a general, as contra distinguished from the local, act."

This case was affirmed by the Court of Appeals of New York, 126 N. Y. 459. In sustaining the law the Court said:

"The fact that an act operates only upon a limited area, or upon persons within a specified locality, and not generally throughout the state, is in most cases a reasonably accurate test by which to determine whether the act is general or local. But it is not decisive in all cases. The entire state may be interested in the enactment and execution of a law operating territorially upon a particular section of the state only.

"In some general sense all the people are or may be interested in laws of a public character, although local, as for example in the administration of justice in the city of New York, the construction and reparation of streets and highways, in whatever locality they may be. This is not, however, such a direct interest as makes laws providing for local courts in a specified locality, or for the construction of a bridge, general. But are laws regulating quarantine in the port of New York, or the landing of immigrants therein, local in the same sense as laws relating to city courts, or to a particular highway or street? The eighth section of the act of 1886 was manifestly enacted for the protection of the harbor of New York in the interest of commerce and navigation. The citizens of New York City may possibly have a greater stake in the matter than citizens in other localities. But the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state. It

> would impair its revenues, imperil its system of river, canal, and railroad transportation, and it is not too much to say that every industrial interest, agricultural or mechanical, would feel its blighting influence. A law having for its object the protection of the navigation in the harbor of New York, is, we think, general, and not local. The act is limited territorially, but the subject is both public and general."

In Devardelaben vs. State, 99 Tenn. 649 (42 S. W. 684), the Court considered the validity of a law which declared it a crime to bet money on a horse race if the betting took place outside of an inclosure but lawful if it took place within the inclosure. In sustaining the law the Court gives as its reason that the law applied to all persons alike, because "persons on the inside of the inclosure may go out and those on the outside may go in."

In West v. Blake, 4 Blackf, 236, the Supreme Court of Indiana says:

"Statutes incorporating counties, fixing their boundaries, establishing court houses, canals, turnpikes, railroads, etc., for public uses, though operating upon local subjects, are not for that reason necessarily special or local."

In Maxwell v. Tillamook County, 26 Pac. 803, an Act appropriating a sum of money for the building of a wagon road in a certain county of the State of Oregon was held special and local as being intended for the benefit of that particular county and its inhabitants only.

In People v. Allen, 42 N. Y. 378, an Act appropriating money for the improvement of the Boquet River was held to be a local act because of the insignificant character of the Boquet River and because the improvement of the same would be mainly for the benefit of the people living in the immediate locality. In that case the Court intimates, however, that an Act for the improvement of the Hudson River would not be a local but a general one, because of it being the connecting link in the chain of water communication between the ocean and inland lakes.

Under a constitutional provision inhibiting the enactment of "local or special" laws for "laying, opening, and working highways" the Supreme Court of Oregon in the case of Oregon vs. Hirsch, 8 Ore. 412, upholds two acts, one providing for the construction of a road in Grant and Baker counties, to be known as the Eastern Oregon-Winnemucca Road, the other for a road from Multnomah to Wasco County, along the Columbia River. After reviewing a great many authorities, the Court said:

> "The general principle to be derived from all the authorities seems to be this, that whenever an act of the legislature authorizes any public road or other internal improvement to be made or other act done which in its nature is more beneficial to the community at large than to the inhabitants in the immediate locality of the road or other internal improvement, such act is to be considered a public and not a special or local law."

The Court further says, referring to the road under consideration:

> "It is in no sense a local road. The advantages to the inhabitants living along the route or line of road are insignificant when compared with the benefits of the people at large, or at least to those residing in the two great sections before referred to, whenever the road shall be completed."

In Long v. State, 175 Ind. 17, 92 N.E. 653, it is held that the statute prescribing punishment for fishing with seines in any waters of the state except Lake Michigan, private ponds, and the Ohio or Wabash rivers, so far as they are boundary lines between the states of Indiana and Illinois, and making it unlawful to seine in such rivers within 100 yards of the mouth of any stream emptying into them from the Indiana side, does not violate Sec. 22, Art. 4, Const., prohibiting the passage of local laws for the punishment of crimes and misdemeanors. To the contention that the provisions making it unlawful to seine in certain waters renders the act local and void, the Court said:

> "If it be conceded that the act provides for the punishment of crimes and misdemeanors within the meaning of the Constitutional provision cited, it does not follow that it is (local and) invalid. Art. 4, Sec. 22, Const., does not preclude proper classification in legislation relating to the subjects therein enumerated, but does prohibit legislation which rests upon such arbitrary selection as renders the act local or special. Many of our penal statutes have exclusive application to special

localities or objects and are nevertheless general and unquestionably valid, because they rest upon an inherent and substantial basis of classification. *The purpose of the act under consideration manifestly was to protect and promote the supply of fish in the waters of this state.* The basis upon which the excepted class was formed is equally clear. Private ponds were excluded, since the fish therein are in a sense private property. The other waters are either partly or wholly beyond the boundaries of the state. It would be a vain thing to prohibit seining on the north side of the Ohio and on the east side of the Wabash, where they form state boundaries, when this mode of fishing was allowable on the opposite shores. The habit of fish to leave the larger rivers and ascend the smaller streams during certain seasons is well known.

"The prohibition against seining within a radius of 100 yards of the mouth of any Indiana stream emptying into the boundary rivers was clearly designed to prevent interruption or disturbance of the natural migration of fish from those rivers up the streams of this state. This was plainly within the objects of the act. The line defining the precise limit of classes must in most cases be in a sense arbitrary. The legislature had full power over the subject-matter of this legislation, and in making the exceptions contained in the act, there is no evidence of bad faith or purely arbitrary action. In view of the size of the boundary rivers, we cannot say that the 100 yard limit from the mouth of tributary streams is not reasonably calculated to subserve the legislative purposes. It is our conclusion, therefore, that the statute does not contravene Art. 4, No. 22, Const."

So, in Gentile v. State, 29 Ind. 409, it was held that an act for the protection of fish for a

certain period in any of the lakes, rivers, or small streams of the state was not within the constitutional prohibition against local legislation.

And following the ruling of Gentile v. State, supra., the same statute was held constitutional in State v. Boone, 30 Ind. 225, and Stuttsman v. State, 57 Ind. 119.

It is held in State v. Hanlon, 77 Ohio St. 19, 13 L. R. A. (N. S.) 539, 122 Am. St. Rep. 472, 82 N. E. 662, that a statute, in so far as it enacts that every person, firm, or corporation desiring to engage in fishing in the waters of Lake Erie and the estuaries and bays thereof within the state shall make application to the commissioners of fish and game, and obtain a license or authority so to do, and for such license or authority shall pay the fee therein specified, is a valid enactment, and is neither in violation of the 14th Amendment of the Federal Constitution, nor repugnant to Sec. 26, Art. 2, of the state constitution, which provides, that all laws of a general nature shall have a uniform operation throughout the state. The Court said that, it being matter of public and common knowledge that reasons may and do exist for imposing conditions and restrictions upon persons engaged in fishing with nets in the waters of Lake Erie, that do not apply to or exist as to other waters of the state, such enactment would be valid law, and not in conflict with Sec. 26 Art. 2, of the state constitution.

Constitutional inhibitions like those of the aforementioned Act of 1886 are found in the constitutions of many of the states—perhaps in most of the states; but such provisions have not been considered as interfering with the power of a state legislature to enact game and fish regulations which prescribe different rules for the different districts within the same state.

The Constitution of Oregon (Sec. 23 Art. IV) provides:

"The legislative assembly shall not pass special or local laws*****for the punishment of crimes and misdemeanors."

Under that constitution the State of Oregon has from the earliest days followed the system of enacting separate regulations for the several fishing grounds, and denounced the violation of these regulations as crime.

Sections 7432 to 7474 Olson's Oregon Laws are devoted to the establishment of zoning systems for migratory fish, and Sections 7564 to 7602 are devoted to a similar system for oysters, clams, crabs and crawfish.

Sections 2310, 2316 and 2317 of the same compilation are part of the penal code of Oregon and are devoted to provide punishments for fishing unlawfully in various streams mentioned by name and as such segregated from the rest of the country.

Under these Oregon laws, what is a crime in one part of the state is not a crime in another part of the state.

That these enactments are "for the punishment of crimes and misdemeanors" in contemplation of the Constitution of Oregon is settled by the Supreme Court of that state in Lewis vs. Varney, 85 Ore. 402, (167 Pac. 271). In that case the Court held that a law providing a license tax for dogs to be collected by the constables in the several counties was void, as in conflict with the constitutional provisions above mentioned, because the law applied only to some counties in the state and not to all.

The principle of law adduced from the foregoing decision must be applied to the case at bar in light of the characteristics and habits of the species of fish to which the law applies and in light of the character of the great industry intended to be protected.

The Alaska salmon is not a matter for local consumption. It has become a very common food for humanity generally, not only throughout the United States, but the world. The law in question does not affect a local community alone, nor the entire Territory alone.—It affects the entire country.

It is notorious that the five species of salmon which frequent the waters of Alaska and of British Columbia, propagate in the rivers and lakes of Alaska, going to sea at an early age, becoming

the property of humanity generally, and return to the parent stream for spawning.

The salmon run each season commences early in the year in the waters laving Alaska Peninsula and opens gradually later as one goes easterly and southeasterly along the coast of the Territory. The season is closed before the middle of July in Bristol Bay and at the peninsular points, but does not close in the southeastern part of the Territory till the last days of September.

The salmon industry is carried on principally by corporations financed and managed outside of the Territory, and the fishing itself is done to a large etxent by people from the states. The protection of salmon in the waters of southeastern Alaska present quite different problems from those with which the authorities have to deal along the west coast. In Southeastern Alaska there are thousands of salmon streams all emptying into coves, bays or narrow inlets where illegal fishing at the mouths of the streams is extremely difficult to detect, and where the enforcement of the law prohibiting fishing at the mouth of the streams has been found impossible. It was for this reason that it was thought advisable to prohibit fishing entirely for ten days during the particular period of the season when the best varieties of salmon school before the mouths of the streams ready to enter. In as much as the seasons differ in the different waters of Southeastern Alaska, the zoning system was adopted as neces-

sary in order to carry out the purpose of the law.

Conditions along the rest of the Alaskan coast are quite different. In those places the leading salmon streams enter, as a rule, into the open ocean where the opportunity to detect violation of the law is comparatively easy.

The statute here in question comes clearly within the general principle laid down in the authorities here cited to the effect that the law is not "local" in contemplation of constitutional inhibition where it affects all the people alike and where it is aimed at an evil which affects all the people alike irrespective of place of residence.

The vital fact is that the statute here in question is designed for and does protect and preserve the salmon industry along the entire coast and for the benefit of all the people no matter where they reside or where they fish.

It may not be amiss at this time to call attention to the historic fact that it has been, and to a limited extent it still is the custom in the states bordering along the Atlantic coast for a state legislature to delegate power to the local municipalities to regulate fishing within their own respective jurisdictions.

Commonwealth vs. Hilton, 174 *Mass.* 29;
Swift vs. Falmouth 167 *Mass.* 115;
State vs. Nelson 31 *R. I.* 264;
Yarmouth vs. Skillingo 45 *Me.* 133;
Southport vs. Ogden 23 *Conn.* 128;
Smith vs. Levinus 8 *N. Y.* 472.

While this system of legislation was for a long time almost the exclusive regulation of the fisheries, it has become objectionable and has generally given way to general state regulation.

Is it not probable that it was this form of local legislation Congress had in mind when the clause prohibiting local fish legislation was inserted into the Act of 1886? Such inhibition by Congress upon the power of the territories would be in harmony with the spirit of the times. To hold that it was the intent of Congress to prohibit legislatures from enacting regulations which applied equally to all waters at all times would be to effectively prevent both practical protection and practical utilization of the fishing grounds.

The requirement of equality in the operation of a statute is not infringed by legislative classfication of persons or things. This requirement only makes it necessary that the same means and methods be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances. Thus dividing of the waters into zones may be necessary to equalize the operation of the law.

The requirement of equality does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate.

Richmond R. Co. vs. Richmond 96 *U. S.* 521;

Carlton vs. Johnson, 61 *Fla.* 975;

In the Richmond case the Supreme Court said:

> "All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is a special duty of the city authorities to make necessary discrimination in this particular."

On exactly the same theory city ordinances are not held special or local because they provide fire limits, sewer districts, or create zones where buildings of only a certain character are permitted, or zones within which certain industries are prohibited. Nor is it illegal for a state or municipality to enact road regulations which permit higher speed in some localities than in others.

If the law here in question had provided that it should be unlawful to fish salmon between certain dates in waters where the height of the run occurs on the 10th of August, and that it should be unlawful to fish salmon between certain other dates in any waters of the Territory where the height of the salmon run occurs on the 20th of August, no objection would have been made to the law on the ground that it was local in its application. But if the law had been thus worded every trial of its infraction would have resulted in a swearing match between fish experts as to the exact date of the salmon run. The legislature

undertook to settle the question in advance. It determined the period of the run in the various sections of the inland waters, so called, of Southeastern Alaska, and has created the zones in conformity with that determination.

The Act of June 9th, 1896, excepts certain areas from the operation of that law. The same is true of the Act of June 26th, 1906.

The Federal game laws of Alaska divided the Territory into zones or districts. Sections 331 and 334 C. L. A.

Alaska is continental in extent. It stretches through 18 degrees of latitude and 45 degrees longitude and has a coast line of 25,000 miles, or five times as much as the United States exclusive of Alaska. It has an area almost equal to all the United States east of the Mississippi River and has a climate that varies from sub-tropical to arctic. Congress had found it impossible to make either fish laws or game laws for this domain without a zoning system, and it is not to be thought that Congress considered the local legislature possessed of greater astuteness.

The provisions of the Act of 1886 were not intended as pedagogic requirements to do the impossible. They were enacted by reasonable men for reasonable men.

Respectfully submitted,

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